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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. IVAN R. SOTO, Defendant and Appellant.	B287568 (Los Angeles County Super. Ct. No. BA453817)
In re IVAN R. SOTO on Habeas Corpus.	B292074 (Los Angeles County Super. Ct. No. BA453817)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy, Judge. Affirmed; petition denied.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In January 2017, appellant Ivan R. Soto was driving in Los Angeles when he was cut off by a van that passed him at an intersection. Soto responded by driving into oncoming traffic twice in order to position himself within firing range of the driver, and unleashed four to five bullets in the driver's direction. No one was seriously injured.

A jury convicted Soto of attempted willful, deliberate, and premeditated murder, and found true a firearm enhancement that subjected Soto to an additional 20 years in prison. Soto was sentenced to life with the possibility of parole for the attempted murder and the court imposed the 20-year firearm enhancement. Soto is now serving an aggregate term of 27 years to life in prison.

On appeal and in his consolidated petition for writ of habeas corpus, Soto argues substantial evidence did not support the jury's verdict that he intended to kill anyone or that he acted willfully, deliberately, and with premeditation; the court erred by denying his motion to strike the allegation of deliberation and premeditation; the court abused its discretion in precluding him from introducing evidence of a prior shooting at his workplace; the court erred by failing to provide the jury with an instruction on a lesser included offense; the court abused its discretion by declining to strike the gun enhancement; the prosecutor committed misconduct by making improper comments during closing arguments; he received ineffective assistance of counsel when his attorney did not object to the prosecutor's comments; and his case must be remanded for the court to conduct a hearing on whether he has the ability to pay the fines and fees imposed at sentencing.

We conclude Soto's allegations are without merit. Accordingly, we affirm the judgment and deny the petition for habeas corpus.

FACTUAL AND PROCEDURAL BACKGROUND

I. Relevant Prosecution Evidence

On the morning of January 18, 2017, Leticia Alvarado and her three- and one-half month-old baby had a doctor's appointment at a health clinic at the corner of Western Avenue and Santa Monica Boulevard in Los Angeles. After the appointment, at approximately 11:00 a.m., the clinic arranged for Arturo Munoz to drive Alvarado and her daughter home in a van. Alvarado was seated in the middle row behind the front driver's seat, and her daughter was in a car seat right next to her.

According to Alvarado, as Munoz was traveling southbound on Wilton, he passed a white car—later identified as belonging to Soto—on the right side at Fourth Street, and then drove into the left lane ahead of the white car. Before reaching Fifth Street, Munoz felt two strong impacts to the van. Alvarado heard a gunshot. Soto then crossed the middle divider line into the opposing lane of traffic, and tried to pass Munoz. Due to oncoming traffic, Soto was not able to pass Munoz, so he moved back behind him. Alvarado heard two more shots and Munoz felt two more impacts to the van. Munoz also felt a burning sensation above his left eyebrow. Munoz wrote down Soto's license plate number, pulled over to the side of the road, and called 911. When Munoz opened his door to exit the van, the driver's side window shattered. Munoz was not sure whether the burning sensation above his left eyebrow was caused by a bullet or a fragment of glass, but he felt it after the second round of

shots, not when he opened the door and his window shattered. Munoz did not require medical attention for the injury.

Alvarado observed Soto pointing a black gun at the van, "trying to kill" them. She began crying and draped her body on top of the car seat to protect her daughter. Soto then caught up to the van, crossed over the yellow lane into oncoming traffic to pass the van, and fired three more shots. Soto made an immediate U-turn and drove away northbound on Wilton.

Alvarado testified Munoz was not acting angry, yelling, or shouting before Soto began shooting. Alvarado also testified she did not observe Munoz trying to hit Soto with the van.

Luis Garcia lived in an apartment building in the 400 block of Wilton. At approximately 11:00 a.m., he heard gunshots. Garcia looked outside his window and saw a van stopped next to a white car. The van began driving and moved from the right lane into the left lane in front of the white car. The white car then drove from the left lane across the middle double line into oncoming traffic. Garcia did not see the van trying to hit or push the white car into oncoming traffic; rather, it appeared that the car was trying to pass the van. Garcia did not observe the van being driven carelessly. Garcia heard one more shot; in all, Garcia estimated he heard approximately five gunshots. Garcia heard the last gunshot after he observed the white car driving into oncoming traffic.

Police officers responding to the scene recovered a spent round in the inner frame of the driver's side door, and another on the floorboard behind the front passenger seat. Detective Samuel Arnold ran the license plate number and discovered Soto was the registered owner of the white car. Arnold also discovered Soto was the registered owner of a Glock pistol.

That night, at approximately 11:00 p.m., Soto's girlfriend Ziracotta Lee picked up Soto at his house. Approximately 45 minutes later, they were pulled over by police officers. Detective Raymond Olivas obtained Lee's consent to search the car and recovered a Glock firearm and a knife under the front passenger seat. The firearm had six rounds in the magazine and one round in the chamber. Olivas also recovered three spent bullet casings in a lunch bag, $3,646 in cash in a duffel bag, and a second magazine loaded with ten rounds of ammunition.

Olivas also searched Soto's residence and found a vehicle registration in Soto's name. The vehicle was parked in the driveway of the house and had a license plate number matching the number provided by Munoz. Police also recovered 1,040 rounds of ammunition in Soto's bedroom, and a number of rifles and shotguns. Soto filed a motion to exclude evidence of the shotguns and rifles found in his apartment, which the court granted.

Jacob Seror, a criminalist with the Los Angeles Police Department, examined Soto's Glock firearm, the three shell casings recovered from Lee's vehicle, and the two spent bullets recovered from Munoz's van. Seror testified the bullets and shell casings had been fired from Soto's gun.

II. **Defense Evidence**

Soto testified that he was driving southbound on Wilton at approximately 11:00 a.m. on the morning of January 18, 2017. As he was driving, Soto noticed Munoz weaving in and out of traffic and stated Munoz attempted to cut him off prior to reaching Fourth Street.

Shortly thereafter, Munoz "floored it" and cut Soto off. Soto was behind Munoz when they both stopped at Beverly Boulevard;

Soto observed Munoz's face from the nose down and testified Munoz was "laughing hysterically." Munoz ran the stop sign at First Street. Both cars stopped at a red light at Third Street. Soto was in the left lane, and Munoz was to the right of him in a section designated for cars turning right. When the light turned green, Soto waited for Munoz to proceed ahead of him but Munoz did not move. Soto therefore "went about [his] way, driving normally, southbound." Soto then observed Munoz driving very fast behind him. Somewhere near Fourth or Fifth Street, Munoz began veering into Soto's lane. At this point, Soto felt scared because he thought Munoz was going to collide with his car. Munoz did not cut Soto off at that point, but moved over into the right lane. After Soto "tapped the brake to allow [Munoz] to proceed," Munoz tried to cut him off again, forcing Soto partially over the center line and into oncoming traffic.

Soto then observed a truck coming toward him. Soto thought he was going to die. He unholstered his pistol and fired in Munoz's direction. Soto does not remember how many shots he fired. After firing his gun, Soto was able to get back into the southbound lane. Soto admitted making a U-turn, but has no recollection of doing so. Soto stated he left the scene because he was scared.

II. Charges, Verdict, and Sentence

Soto was charged with the attempted willful, deliberate, and premeditated murders of Munoz, Alvarado, and Alvarado's daughter (Pen. Code, §§ 187, subd. (a), 664 [counts 1, 2 & 3, respectively]).[1] It was further alleged with respect to counts 1, 2 and 3 that Soto personally and intentionally discharged a firearm

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1 All further statutory references are the Penal Code.

within the meaning of section 12022.53, subdivision (c), and personally used a firearm within the meaning of section 12022.53, subdivision (b). Soto was charged in count 4 with shooting at an occupied vehicle (§ 246).

In relevant part, the court instructed the jury on attempted murder; the allegation that the attempted murder was committed willfully and with deliberation and premeditation; the allegation that Soto personally and intentionally discharged a firearm during the commission of the offense; self-defense; and imperfect self-defense. The jury found Soto guilty of count 1, and found true the firearm allegations as to count 1. The jury found Soto not guilty of counts 2 and 3, and found him guilty of count 4. The trial court sentenced Soto to a term of life with the possibility of parole on count 1, and imposed a 20-year firearm enhancement pursuant to section 12022.53, subdivision (c). The court imposed and suspended a five-year term on count 4. The court also imposed a $2,000 restitution fine, a total of $70 in court construction and security fines, and authorized the fines to be collected from Soto's prison earnings. In addition, the court signed an order returning Soto's property to him, including the $3,646 in cash recovered from the duffel bag.

DISCUSSION

I. The Verdict Was Supported by Substantial Evidence

Soto argues there was insufficient evidence to support his conviction of attempted willful, deliberate, and premeditated murder because the evidence did not support the jury's finding that Soto intended to kill anyone or that his actions were deliberate and premeditated. We disagree.

A. Standard of Review

When a defendant challenges the sufficiency of the evidence to support a judgment, we review the evidence under the familiar and deferential substantial evidence standard. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) Substantial evidence is evidence that is "reasonable, credible, and of solid value." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) We review the record in the light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Lee* (2011) 51 Cal.4th 620, 632.) It is the "exclusive province of the trial judge or jury to determine the credibility of a witness," and to determine the weight to be given to the testimony adduced at trial. (*Ibid.*; *Hicks*, at p. 429.) Reversal under this standard of review "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

B. Intent

To prove a defendant is guilty of attempted murder, there must be sufficient evidence of a "specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Intent "may in many cases be inferred from the defendant's acts and the circumstances of the crime," and " '[t]he act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill." ' " (*People v. Smith* (2005) 37 Cal.4th 733, 741.)

Here, there was substantial evidence Soto acted with specific intent to kill Munoz. The evidence demonstrates that

Soto fired directly at Munoz's van while driving parallel to the vehicle. He was close enough to Munoz to have inflicted a mortal wound; indeed, a bullet casing was found inside the driver's side door and Munoz felt a burning sensation at the top of his eyebrow after hearing the second set of shots. (*People v. Smith*, *supra*, 37 Cal.4th at pp. 741.) This evidence is reasonable, credible, and of solid enough value to support the jury's finding that Soto acted with the specific intent to kill. (*People v. Rodriguez*, *supra*, 20 Cal.4th at p. 11.)

C. Premeditation and Deliberation

"An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) Premeditated means " ' " 'considered beforehand,' " ' " and deliberate means " ' " 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' " ' " (*People v. Houston* (2012) 54 Cal.4th 1186, 1216 (*Houston*).) The "requisite reflection," however, "need not span a specific or extended period of time," as " '[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' " (*Stitely,* at p. 543.)

Although the parties agreed at trial that the entire incident occurred very quickly, there was sufficient evidence to support the jury's conclusion that Soto considered and weighed his options before shooting at Munoz.

Soto maintains that Munoz was driving aggressively and forced him into oncoming traffic. Munoz and Alvarado testified, however, it was Soto who followed them down Wilton and twice tried to pass them while driving into oncoming traffic. Garcia

and Alvarado also testified Munoz was not driving erratically or otherwise displaying signs of anger or aggression. Garcia testified he did not observe Munoz pushing Soto into oncoming traffic, rather it appeared Soto was attempting to pass Munoz's van. Furthermore, rather than pulling over to the side of the street, or turning off Wilton on to another street entirely, Soto chose to pursue Munoz as they proceeded southbound on Wilton. The jury could have readily concluded Soto's decision not to get out of harm's way belied his assertion that Munoz was the aggressor and Soto was acting only in self-defense.

The testimony provided by Munoz, Alvarado, and Garcia is more than sufficient to establish that Soto acted with deliberation and premeditation. Each testified that there were two sets of gunshots. The first time, after Munoz cut him off at an intersection, Soto drove parallel to Munoz in the opposite lane of traffic, unholstered his gun, pointed it toward Munoz, and fired in Munoz's direction. Soto was then able to slow down, retreat, and move back into the left lane behind Munoz before he chose to drive into oncoming traffic, again position himself next to Munoz's van, and fire another round of shots. Reviewing the record in the light most favorable to the judgment, we conclude there was substantial evidence establishing Soto's actions were not the product of "unconsidered or rash impulse" but based on consideration and reflection. (*Houston*, *supra*, 54 Cal.4th at p. 1216.)

II. Soto's Motion to Dismiss the Allegation of Deliberation and Premeditation

At the conclusion of the People's case-in-chief, Soto moved pursuant to section 1118.1 to dismiss the allegation that he acted willfully, deliberately, and with premeditation. Soto contends the

trial court erred in denying his motion to dismiss the premeditation and deliberation allegation, entitling him to a reversal of the true finding that he committed the attempted murder willfully, and with premeditation and deliberation. Not so.

Section 1118.1 allows the court "on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision," to "order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal." We review the denial of a section 1118.1 motion "under the standard employed in reviewing the sufficiency of the evidence to support a conviction." (*Houston*, *supra*, 54 Cal.4th at p. 1215.)

Because we have already concluded in part I.C., *ante*, that substantial evidence supports the jury's finding of deliberation and premeditation, we also conclude the court properly denied Soto's section 1118.1 motion.

III. The Workplace Shooting

Soto attempted to subpoena police reports of a shooting that occurred at the shopping plaza where he worked to explain to the jury why he was carrying a gun, and to argue that he acted out of fear rather than with premeditation and deliberation when he shot Munoz's van. The court determined the police reports were irrelevant to Soto's case and quashed the subpoena. The court advised Soto that if the shooting had an impact on him

emotionally or mentally, he could raise the issue "in different ways and through different manners."[2]

Soto testified that there was a shooting at his workplace "between January 23rd, 25th[,] or 27th" in either 2015 or 2016, which is why he carried a gun in his car. Defense counsel asked Soto if he took a photograph of the police tape surrounding the crime scene at the shopping plaza, and the court sustained the People's relevance objection. Defense counsel also asked Detective Arnold if he remembered seeing photos of the police tape on one of the cell phones that Detective Arnold confiscated upon Soto's arrest. Detective Arnold replied that he had no recollection of seeing any such photos.

During closing argument, defense counsel argued the workplace shooting was the reason Soto carried a gun, and urged the jury to consider the prior incident when determining whether Soto acted in self-defense. Defense counsel also told the jury there was "uncontroverted evidence" of this prior shooting because if it did not happen, the People would have brought Detective Arnold as a rebuttal witness to testify that it "never happened." During rebuttal, the prosecutor told the jury that she did not know whether there was a shooting at Soto's workplace and then stated, "Quite frankly, probably. This is L.A.; I'm sure there was a shooting there." The prosecutor then went on to say that if there was a shooting, "the detective had a burden to go out there and then try and get a report to prove or disprove it, about a shooting when we are not sure what date; we are not sure what

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[2] The judge who conducted the hearing on the motion to quash was not the same judge who presided over Soto's trial and sentencing.

year? . . . [¶] The defendant knows about this shooting. Well, why didn't he bring in a report to indicate this had happened and support his story?"

Soto argues the court abused its discretion in quashing the subpoena and deprived him of due process by preventing him from admitting corroborating evidence of the workplace shooting. Soto also argues the prosecutor committed misconduct in rebuttal by questioning why Soto did not have a police report, and claims he received ineffective assistance of counsel because his trial attorney did not object to these comments during rebuttal. Because Soto has failed to demonstrate he suffered prejudice from the evidentiary rulings, and has not stated a prima facie case for relief on his prosecutorial misconduct and ineffective assistance of counsel claims, his arguments about the prior workplace shooting must fail.

A. Evidentiary Rulings

With respect to the court's evidentiary rulings, we review them for prejudice to determine whether, upon examination of the entire case and the evidence, "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)[3]

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[3] Soto urges us to review the evidentiary rulings under the stricter beyond a reasonable doubt standard reserved for errors of constitutional dimension. However, a court's application of state evidentiary rules of evidence does not " ' "impermissibly infringe on a defendant's right to present a defense." ' " (*People v. Boyette* (2002) 29 Cal.4th 381, 427–428.) We therefore decline to apply the stricter standard and analyze the issue under *Watson*.

Soto attempted to argue that he was so traumatized by the prior shooting that he acted in unreasonable self-defense. We note, however, that he never gave any details of the shooting to the court at the hearing on the motion to quash the subpoena. The court therefore did not know whether Soto witnessed the shooting, saw the perpetrator or the victim, or even heard the gun fire. In other words, Soto never explained how or why the shooting was relevant to his state of mind years and months later when a car cut him off in traffic. The court did not preclude Soto from introducing evidence through Soto's coworkers or other percipient witnesses to the shooting, or from introducing evidence of any traumatic effects Soto may have suffered in its aftermath. Soto simply did not do so.

We cannot conclude it is reasonably probable the jury would have believed Soto genuinely felt his life was in danger when he shot at Munoz's van even if it had received corroborating evidence of the workplace shooting. As discussed above, Soto drove parallel to Munoz in the opposite lane of traffic, unholstered his gun, pointed it at Munoz and fired in his direction. Soto then slowed down, retreated into the left lane of traffic behind Munoz, and then again chose to drive into oncoming traffic, position himself next to Munoz's car, and fired again. At no time did Soto turn off on to a side street or otherwise try to get out of harm's way. These are not the actions of a man traumatized by a prior shooting at the shopping plaza where he worked; they are the actions of a man who intentionally, deliberately, and with premeditation attempted to kill a man because he was cut off in traffic.

Finally, Soto argues corroborating evidence of the workplace shooting would have explained why Soto carried a gun

in his car. The gun, however, was not an issue at trial. Detective Arnold testified Soto was the legal, registered owner of the gun. Additionally, the prosecutor's theory was that Soto formulated his intent to kill with deliberation and premeditation not when he chose to carry a firearm, but when he used it after Munoz cut him off in traffic. The fact that the workplace shooting may have led Soto to purchase and carry a gun therefore has no relevance to whether he acted in self-defense.

B. Ineffective Assistance of Counsel

Defense counsel's failure to object to the prosecutor's arguments in rebuttal does not constitute ineffective assistance of counsel. To prevail, Soto would have to establish that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's deficient performance prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 (*Strickland*); *In re Thomas* (2006) 37 Cal.4th 1249, 1256.) Appellate courts defer to the "reasonable tactical decisions" made by attorneys when examining whether the representation fell below an objective standard of reasonableness. (*People v. Stanley* (2006) 39 Cal.4th 913, 954.) " ' "[W]e accord great deference to counsel's tactical decisions" ' " and we do not " ' "second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight." ' " (*Ibid.*) Tactical decisions, even if erroneous, " ' "are generally not deemed reversible." ' " (*Ibid.*)

Prejudice exists where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland, supra,* 466 U.S. at p. 694.) A "reasonable probability" is "a probability

sufficient to undermine confidence in the outcome." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

Soto argues defense counsel's failure to object to the prosecutor's comments did not reflect a tactical decision that a reasonably competent attorney would have made under the circumstances. We disagree. Soto's attorney told appellate counsel that he believed the jurors were receptive to his argument that the prosecutor should have called Detective Arnold as a rebuttal witness if they thought the workplace shooting did not occur. He stated that, while he was surprised the prosecutor asked in rebuttal why Soto did not produce police reports, he did not object because he thought Soto's testimony about the shooting was credible and the prosecutor never rebutted that testimony with contrary evidence. Defense counsel also told appellate counsel that he rarely objects to opposing counsel's arguments unless he or she commits an "egregious error" since, in his experience, trial judges rarely sustain these types of objections and objecting in argument does not impress jurors.

Defense counsel's choice not to object to the prosecutor's statements in rebuttal does not warrant reversal. He knew the jury that sat before them and could assess which arguments and evidence the jury found compelling, and whether drawing attention to an evidentiary matter raised at the very end of trial would have been well received. According great deference to defense counsel, we cannot conclude that his failure to object fell below an objective standard of reasonableness.

Furthermore, for the reasons explained above, we find no prejudice. Given Soto's actions in pursuing and shooting at Munoz twice, and by failing to retreat if he indeed felt his life was

in danger, we cannot conclude that the prosecution's statements about why Soto did not introduce evidence to "support his story" about the workplace shooting undermined Soto's credibility so much that it affected the jury's verdict.

C. Prosecutorial Misconduct

At a hearing in July 2017—four months before trial—defense counsel informed the court and the prosecutor that he subpoenaed "some documents" from the Los Angeles Police Department, but said no more about the nature of the documents he was requesting or why he was requesting them. The motion to quash the subpoena was brought shortly thereafter by the Los Angeles City Attorney, not the District Attorney. The hearing on the motion took place in chambers, outside the presence of the Deputy District Attorney. The Deputy District Attorney did not enter the courtroom until after the hearing was complete and the court had already issued its ruling to quash the subpoena.

We cannot assume the prosecutor was aware at the July 2017 hearing that Soto was seeking to obtain information about a shooting at the shopping plaza where he worked. Furthermore, we cannot expect the prosecutor to have remembered this brief exchange months later at trial. We therefore cannot conclude that the prosecutor used "deceptive or reprehensible methods to persuade the trial court or the jury." (*People v. Panah* (2005) 35 Cal.4th 395, 462.) And trial counsel's failure to object to the prosecutor's comments and request an admonition of the jury forfeits the claim on appeal. (*Ibid.*)

IV. Jury Instructions

The trial court has a sua sponte duty to instruct on a lesser included offense when "there is substantial evidence that would absolve the defendant from guilt of the greater, but not the

lesser, offense." (*People v. Simon* (2016) 1 Cal.5th 98, 132.) Substantial evidence is evidence from which a jury composed of reasonable people could find persuasive and could conclude that the lesser, but not the greater, offense was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).)

In reviewing the evidence de novo to determine whether the evidence is substantial enough to support an instruction on a lesser included offense, the court "should not evaluate the credibility of [a witness], a task for the jury." (*Breverman*, *supra*, 19 Cal.4th at p. 162.) And, the reviewing court determines only the "bare legal sufficiency" of the evidence, "not its weight." (*Id.* at p. 177.) "As such, a sua sponte instruction should be given on every offense or theory supported by the evidence, and not merely on the theory most strongly supported by the evidence" or "believed to have the greatest merit." (5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Trial, Requirement of Instruction, § 678, p. 1048.) Even when, for tactical reasons, defense counsel objects to an instruction on a lesser included offense because it is inconsistent with his or her defense theory, the court must nonetheless provide the instruction. (*People v. Barton* (1995) 12 Cal.4th 186, 190, 193.)

In a noncapital case, a trial court's error in failing to instruct sua sponte on a lesser included offense supported by the evidence must be reviewed for prejudice under *Watson*. (*Breverman*, *supra*, 19 Cal.4th at p. 178.) The reviewing court "focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration." (*Id.* at p. 177.) In making this determination, we "consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence

supporting a different outcome is so *comparatively* weak, that there is no reasonable probability" that the error affected the result. (*Ibid.*) A conviction of the charged offense may be reversed upon a failure to instruct on a lesser included offense only if, "'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred (*Watson*, *supra*, 46 Cal.2d [at p.] 836)."[4] (*Breverman,* at p. 178.)

Here, the court gave a manslaughter instruction based on imperfect self-defense, but did not instruct the jury on heat of passion, which usually " ' "supplements the self-defense instruction." ' " (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1138.) During deliberation, the jury asked whether there was a charge that is "willful and deliberate, but not premeditated?" and whether they had the option of convicting Soto of "attempted voluntary manslaughter without self-defense?" Soto relies on this question in large part to argue that the jury would have convicted him of attempted voluntary manslaughter based on heat of passion. We disagree and conclude any error by the court was harmless.

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[4] Soto again urges us to apply the more stringent beyond a reasonable doubt standard to our analysis of whether failing to instruct on a lesser offense constitutes prejudicial error. He cites the dissent in *Breverman* and several California Supreme Court cases that he claims have "hinted" at whether such a failure to instruct implicates a federal constitutional right. We decline to apply the federal standard and will adhere to the majority in *Breverman*, which determined the *Watson* standard applies to a trial court's sua sponte duty to instruct.

First, when a jury returns a verdict that an attempted murder was willful, premeditated, and deliberate, the finding is " 'manifestly inconsistent with having acted under the heat of passion' " and "clearly demonstrate[s]" that a defendant was not prejudiced by the failure to give the instruction. (*People v. Millbrook, supra,* 222 Cal.App.4th at p. 1138, quoting *People v. Wharton* (1991) 53 Cal.3d 522, 572.) Here, when the jury asked whether it could convict Soto of attempted voluntary manslaughter under another theory, it had already determined that Soto acted willfully and with deliberation. At this point, it may have been struggling with whether Soto's actions were premeditated, but heat of passion requires a finding that a defendant acted " ' "rashly and without deliberation and reflection." ' " (*People v. Beltran* (2013) 56 Cal.4th 935, 942.) "Heat of passion is a mental state that precludes the formation of malice" and is "a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation." (*Ibid.*) The jury's determination that Soto acted willfully and with deliberation therefore ruled out the possibility it would have found him guilty of an offense that, by definition, is committed without malice.

Furthermore, the jury was not faced with an impermissible " ' "all or nothing" choice' " between willful, deliberate, premeditated attempted murder or acquittal, thereby " 'impair[ing] the jury's truth-ascertainment function.' " (*Breverman*, *supra*, 19 Cal.4th at p. 158.) Attempted murder is not divided into degrees. (*People v. Smith*, *supra,* 37 Cal.4th at p. 740.) A finding that an attempted murder was willful, deliberate, and premeditated simply allows for enhanced

punishment. (*Ibid.*) Thus, the jury could have found Soto guilty of attempted murder but also found he did not act willfully, deliberately, or with premeditation. As stated above, the jury already determined Soto acted willfully and deliberately when it submitted its question to the court. If it was unable to agree on whether Soto acted with premeditation, it was free to reject the sentence enhancement altogether, which it did not do.

Examining the strength of the evidence supporting the judgment relative to the evidence supporting a different outcome, we conclude Soto was not prejudiced by the court's failure to provide the jury with an instruction on voluntary manslaughter based on heat of passion.

V. The Gun Enhancement

A. The Court's Comments

Before imposing the 20-year firearm enhancement, the court commented that it does not often see criminal defendants like Soto who have no prior criminal record. The court went on to say, "[b]ut yet, the conduct that occurred . . . was I think everybody's worst nightmare." The court then made the following comments: "[W]e live in a very crowded community. And everyone is in a hurry, and everyone has a lot of stress in their life. . . . [¶] And frequently there are people on the road that do things that are very irritating. . . . Drivers cut off drivers; drivers drive too slow; drivers . . . ignore . . . traffic rules. And all those things . . . are irritating. [¶] . . . [¶] But we just kind of have to . . . accept it and deal with it because that's the world that we live in."

The court noted that had Soto injured Munoz, Munoz could have lost control of the vehicle, which would have created "an even more hazardous situation with a van out of control, with a

driver disabled or dead because you fired a gun." The court also noted that drivers frequently cut people off in traffic. "People don't check their side mirrors; people don't check their rearview mirrors. They think it is safe. They move over and change lanes. It happens a thousand times a day. And it's irritating. But it does not justify the kind of response that occurred in this case."

The court also commented: "[I]t's a shame that the mistake that you made was such a grievous one, such a serious one, because not only were the people in that van put at risk by your shooting; this was a busy street; there were a lot of other cars around, people around, and if a crash would have occurred, who knows how many people might have been hurt or even killed, not even directly by the gunfire but by . . . the van colliding into other vehicles, including possibly your own."

The court told Soto that "the whole logic" of his claim that he acted in self-defense "escaped me." The court did not find credible Soto's testimony that he needed to shoot at Munoz multiple times in order to save his own life. The court told Soto that aspects of his testimony were "preposterous" and "made no sense at all. None." The court believed that "not only did you commit the crimes that you were convicted of, but in addition you committed perjury during the course of this trial in an effort to cover them up."

The court also told Soto, "I think that you are a little man who thinks you're a big man because you have a gun, a loaded gun with you." The court found it "very disturbing" that Soto was found in Lee's car with a gun when they were pulled over and he was arrested. The court acknowledged that Soto owned the gun legally, but stated he did not have a right to carry it in a vehicle. The court also said to Soto: "[w]hy do you need to have a loaded

firearm with you every time you are in a car? Or wherever you are going? Especially someone with a temper like yours? Because I think this was a matter of you losing your temper." Finally, the court commented it was "really scary" that someone with so little self-control has an "arsenal of other firearms and ammunition" in his apartment and "has the wherewithal to put innocent members of society at risk because you lose your temper."

B. The Court Did Not Abuse its Discretion by Imposing the Firearm Enhancement

A trial court's decision not to strike a sentencing allegation under section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) The party challenging the sentence has the burden of showing the court's decision was " ' "irrational or arbitrary." ' " (*Id.* at p. 376.) " ' "In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' " (*Id.* at pp. 376-377.)

Until recently, trial courts did not have the authority to strike firearm enhancements found true under sections 12022.5 and 12022.53. On January 1, 2018, Senate Bill No. 620 (2017-2018 Reg. Sess.) became effective, which granted trial courts the authority to exercise their discretion to strike or dismiss firearm enhancements in the interest of justice pursuant to section 1385. (§§ 12022.5, subd. (c), 12022.53, subd. (h).)

Soto argues that the court's imposition of the firearm enhancement fell outside the bounds of reason because his alleged ownership of rifles and shotguns was never presented to the jury; some of the court's comments had anti-Second

Amendment undertones; and it was unclear what evidence the court relied on when it commented on Soto's temper. Soto contends his sentence must be reversed because the court chose to rely on "findings and beliefs that were incorrect and not supported by the evidence in the record." We disagree.

Soto claims the court erred when it relied on his alleged ownership of rifles and guns in imposing the enhancement because the jury must find every element of a sentence enhancement true beyond a reasonable doubt. Because the allegation that police found rifles and shotguns in his home was never presented to the jury, Soto argues, the court violated the Constitution by considering it before imposing the 20-year enhancement.

In *Apprendi v. New Jersey*, upon which Soto relies, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) In that case, the high court found unconstitutional a statute that allowed a judge, not a jury, to find by a preponderance of the evidence whether a criminal defendant was subject to enhanced punishment under a hate crime statute. (*Id.* at p. 469.) *Apprendi* did not, however, hold that once the elements of the sentencing enhancement are found true beyond a reasonable doubt, the court cannot subsequently exercise its discretion to choose a punishment within the allowable range. In fact, *Apprendi* qualified its holding by stating: "[w]e should be clear that nothing . . . suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment

within the range prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case." (*Id.* at p. 481.)

Here, the jury found all elements of the firearm enhancement true beyond a reasonable doubt. The court did not undertake any additional fact-finding to determine whether Soto was eligible for increased punishment. The jury's factual determination that Soto personally and intentionally discharged a firearm was what subjected Soto to the 20-year sentence enhancement. The court did not thereafter comment on the rifles and shotguns found in Soto's home to increase his sentence beyond the statutory limit of 20 years as provided in section 12022.53, subdivision (c); it simply imposed the sentence authorized by the jury's true finding on the enhancement. We therefore find no constitutional violation.

In any event, the rifles and guns found in Soto's home were in no way the sole basis upon which the court imposed the enhancement. The court mentioned them in passing in one paragraph of a five-page transcript detailing the court's reasons for imposing the enhancement. We therefore cannot say the court relied solely on the weapons in Soto's home when it declined to dismiss the enhancement.

Finally, although the court commented about Soto disparagingly, we do not find error. The court carefully considered many aspects of Soto's conduct, including Soto's extremely dangerous and outsized reaction to a minor traffic incident most people in Los Angeles routinely encounter; the widespread damage Soto could have caused had he actually injured Munoz or otherwise caused him to lose control of the van;

Soto's highly improbable explanation for his behavior; and the fear that drivers in Los Angeles have of the type of violent road rage Soto exhibited in response to a minor traffic encounter.

We do not disagree that Soto's sentence is severe, particularly since he had no criminal record. Nonetheless, we cannot reverse it "merely because reasonable people might disagree" about whether his sentence is too harsh. (*People v. Carmony*, *supra*, 33 Cal.4th at p. 377.) We are "neither authorized nor warranted" in substituting our judgment for that of the sentencing judge and we cannot reweigh the factors the court considered in choosing not to dismiss the enhancement. (*Id*. at pp. 377, 379.) Even if we would have ruled differently in the first instance, we cannot conclude that the court's decision was so "irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.)

VI. Fines and Fees

In supplemental briefing, Soto asks us to reverse the imposition of the fines assessed at sentencing and remand the case to the trial court for an ability to pay hearing under *People v. Duenas* (2019) 30 Cal.App.5th 1157. He argues imposition of the fines without an ability to pay hearing violated due process. We disagree.

People v. Duenas held that the trial court must hold an "ability to pay" hearing before imposing court facilities and court operations assessments, and must also stay the execution of mandatory restitution fines unless and until the trial court concludes that the defendant has the present ability to pay. (*People v. Duenas*, *supra*, 30 Cal.App.5th at p. 1164, 1172.)

Here, the record reflects that Soto had the ability to pay the $2,070 in fines that were imposed at sentencing. The court

signed an order returning $3,646 in cash recovered from Soto's duffel bag, which is more than enough for Soto to have immediately paid the fines assessed in his case. Because Soto "points to no evidence in the record supporting his inability to pay," (*People v. Gamache* (2010) 48 Cal.4th 347, 409) a remand would serve no purpose.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

GRIMES, Acting P. J.

WILEY, J.